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MEDICAL MARIJUANA

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HISTORY OF DRUG REGULATION IN THE UNITED STATES

1. Prior to 1914, there were no "illegal" drugs. Different World: Average per capita alcohol consumption in 1810 was 7.1 gallons of pure alcohol for every man, woman, and child in the country

2. Federal structure comes into play as a result of changing attitudes, immigration fears, and the temperance movement.

   A. 1906: Pure Food & Drug Act – regulates the **labeling** of products containing certain drugs including cocaine and heroin.

   B. 1914: Harrison Narcotics Tax Act. Regulates and taxes the distribution of opiates and cocaine. Still lawful for individuals to possess.

   C. 1937: Marihuana Tax Act. Continues federal scheme by taxing marijuana.

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1930-1960: Criminal regulation left to states. Ironically, California passed the first state law prohibiting the possession of hemp and marijuana in 1913, 83 years before California voters passed Initiative 215 creating the most liberal legal environment in US.

1961: Convention on Narcotics. International Treaty to Control Marijuana.

1970: Controlled Substance Act. This comprehensive Federal law, still in effect provide for scheduling of a wide variety of controlled substance and "recreational" drugs. Marijuana classified as a Schedule I drug – that is, a drug without any legitimate medical purpose.

Second Circuit Court of Appeals has, in the last 40 years, refused to reclassify marijuana five times to a Schedule II drug – that is, a controlled substance with legitimate medical use.

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Sixteen states enact laws providing for medical use of marijuana.

Washington Office of Management & Budget estimated that had ESSB 5073 gone into effect, cannabis sales in Washington would have approached $1 billion by 2015.

San Francisco Business Journal estimates that one percent of American electric generation is used by marijuana/cannabis grow operations.

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Medical Use of Marijuana Act

November 1998, Washington voters enact Initiative 692 (Chapter 69.51A RCW)

Focus of Initiative: Creation of affirmative defenses against criminal prosecution for marijuana possession for qualifying patients, their providers, and their physicians.

2007 Amendments: Addresses some unanswered questions:

1. Act broaden to include a variety of healthcare professionals.
2. Designated caregiver amended to qualified provider.
3. Limited regulatory authority to "add terminal or debilitating conditions."

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Major Unanswered Questions

How does the qualified patient or qualified provider obtain marijuana? Assumption of initiative was that patients would grow marijuana for personal use.

Dispensaries:

1. Department of Health opines the sale of marijuana illegal.
2. Department of Revenue collecting sales tax on "donations."
3. Dispensaries continue to expand, accelerating in 2011 during legislature's consideration of ESSB 5073.
4. Rebranding of "dispensaries" as "collective gardens." Store front distribution sites for some illegal grow operations.

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FEDERAL THREATS AND STATE REGULATION

1. The federal government has consistently maintained its right to prosecute state authorized medical marijuana growers, processors, and users.
2. While the Obama administration has indicated that it will not pursue individual patients growing marijuana, the recent letter by the Spokane and Seattle US Attorneys is consistent with prior opinion letters indicating the government's authority and willingness to pursue commercial operations.
3. Federal government may not require states to enforce federal law but may prosecute for violation, deny grants.

Governor Gregoire's primary concern was involving the State and its workers in an illegal enterprise and exposing State employees to potential liability.

Hugh Spitzer: No state employee has been prosecuted by the federal government since the Civil War.

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U.S. Supreme Court's Decision in *Gonzales v. Raich*

In 2002, the DEA at the direction of John Ashcroft, Attorney General, prosecuted the respondents who either grew or had marijuana grown for them. Both women suffered from "a variety of serious medical conditions." The court noted that: "Raich's physician believes the foregoing cannabis treatments would certainly cause Raich excruciating pain and could very well prove fatal."

To make their point, the Department of Justice took Raich's appeals to the U.S. Supreme Court.

Federal law classifies marijuana as Schedule 1 controlled substance with no legitimate medical use. Respondents challenged the application of federal law to plants grown for personal use under "Commerce Clause" – Congress' ability to regulate interstate commerce.

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COURT HOLDINGS

1. The Comprehensive Drug Abuse Prevention & Control Act of 1970 and the closed regulatory system established by Congress, including the classification of marijuana as a Schedule I substance, is within Congress' powers pursuant to the Interstate Commerce Clause.

2. A rational basis exists for concluding that marijuana has no appropriate medical use and that the failure to regulate the interstate manufacture and possession of marijuana "will leave a gaping hole in the CSA."

3. Regardless of whether the particular patients were growing marijuana for their own use, federal precedent involving wheat farmers sustains Congress' regulation of what occurs in your back yard.

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ESSB 5073 Medical Use of Cannabis

PROTECTIONS AGAINST CRIMINAL SANCTIONS OR CIVIL CONSEQUENCES EXTENDED TO:

1. Licensed dispensers VETOED
2. Licensed producers VETOED
3. Licensed processors VETOED
4. Collective growers and gardens
5. Non-residents with out-state authorization VETOED

Affirmative defense available even if not registered under certain conditions.

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- VETOED -

Regulation

1.The State to undertake the establishment of extensive licensing regulations for producers, licensed processors, and licensed dispensaries.

2. Prior to licensing, existing dispensaries and other processors producers may register with the Secretary of State and City or County Clerk and provide letters of intent to the relevant licensing body (Department of Agriculture or Department of Health).

3. One dispensary per 20,000 in population .

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COLLECTIVE GARDEN

10 Qualifying patients

15 Plants per patient with 45 plant maximum

24 oz per patient with 72 oz maximum

No delivery except to qualifying patients

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DISPENSARY ARGUMENT TOASTED

15-DAY WAITING PERIOD

§404 – Person ceasing to be "designated provider" to "qualifying patient" must wait 15 days before serving another qualifying patient

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Civil Rights Extension

Medical cannabis use cannot be the sole basis for:

1. Denial of organ transplant.
2. Restriction of parental and visitation rights.
3. Refusal or eviction from housing (unless all smoking prohibited) VETOED
4. In criminal sentencing, a judge may permit medical cannabis use. VETOED
5. The forfeiture of real or personal property. VETOED

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VETOED
Promotions in Advertising

The Act contains prohibitions against advertising or promotion of cannabis in a way which leads to misuse or abuse.

1. The display, including artistic depictions of a cannabis leaf, are assumed to be promotion for use and abuse.
2. No broadcast TV or radio adds are permitted. Only the dispensary, producer, or processor will be liable; not the media.

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VETOED
Licensing

1. Prior conviction for cannabis offense is not a disqualifying factor.
2. A license may be suspended if a dispenser, processor, or producer is in violation:
   a. Of a support order, or
   b. For the non-payment or default on federal or state guaranteed educational loans!!!

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VETOED
Police And Search Warrant Limitations

Before seeking a non-vehicle search warrant for a cannabis related incident, the police officer must "make reasonable efforts to ascertain" if a location or person is registered. This requirement is not applicable to investigations where:

A. The police officer has observed evidence of a cannabis operation that is unlicensed;
B. There is the theft of electrical power;
C. Evidence of other illegal drugs;
D. Frequent short-term visits consistent with commercial activities "if not a licensed dispensary;"
E. There is an unrelated felony; or
F. Outstanding warrant.

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Section 1102

(1) Cities and towns may adopt and enforce any of the following pertaining to the production, processing, or dispensing of cannabis or cannabis products within their jurisdiction: zoning requirements, business licensing requirements, health and safety requirements, and business taxes. Nothing in this act is intended to limit the authority of cities and towns to impose zoning requirements or other conditions upon licensed dispensers, so long as such requirements do not preclude the possibility of citing licensed dispensers within the jurisdiction. If the jurisdiction has no commercial zones, the jurisdiction is not required to adopt zoning to accommodate licensed dispensers.

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Anomalies or questions raised by Section 1102

1. Note that the prohibition against the preclusion of siting applies only to **licensed dispensers,** not to producers or processors.
2. Is the reference to "business taxes" a separate taxing authorization? Note that the term is not defined and it does not refer to business and occupations taxes.

   A. *Pack v. Superior Court* Limit City involvement in industry citing to the absolute minimum. Avoid special and conditional use permits.

   B. *John and John Does, 1-13 v. Seattle King County Superior Court,* Cause No. 11-2-42621-4 SEA. Alleges Seattle regulat6ory structure not authorized by Section 1102 and violation of 5th amendment. Compare *Sibley v. Obama* 810 F. Supp 2d 309 (2011) – Nothing in DC regulatory structure requires defendants to apply to cultivate or distribute.

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Protections Not Available To:

1. "Qualifying patients" excludes persons "actively supervised for criminal conviction" by Department of Corrections upon determination that use is inconsistent with supervision.

2. Persons subject to the Code of Military Justice

3. Health insurance programs not required to provide as covered benefit (but can).

4. Medical cannabis use prohibited in hotels and public places.

5. Affirmative defense not available with regard to state or local driving offenses.

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§501
Drug Free Workplace Policies

"No accommodation for the medical use of cannabis" is required if an employer has a "drug-free workplace."

Questions:

1. Drug-free workplace not defined and not capitalized. Is t his a term of art referring to the federal Drug-Free Workplace Act or is it intended as a generic term?
2. Impact on *Roe v. TeleTech.*

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Roe v. TeleTech

Facts: Jane Roe sued her employer under theories that the Medical Use of Marijuana Act (MUMA), Chapter 69.51A. RCW implied a civil cause of action against an employer violating MUMA's provisions or in the alternative that her termination violated public policy.

Ms. Roe received authorization for cannabis use for migraine headaches and applied for a job with TeleTech. TeleTech had a drug policy which prohibited any unlawful or improper use or presence of drugs or alcohol in the workplace and tested its employees for drug use. Ms. Roe failed a drug test and her conditional offer of employment was rescinded.

Washington Court of Appeals

The Washington Court of Appeals found that *Roe* must show:

1. She is within the class for whose special benefit the law has been enacted,
2. The voters intended to create a remedy, and
3. The implied remedy is consistent with the underlying purpose of MUMA.

The court found that the overriding purpose of MUMA was to provide protections against criminal liability, not workplace protections. The court also found no indication of an intent to create a public policy.

Court of Appeals – Reliance on Decisions in Other States

California, Oregon, and Michigan have all held that their medical marijuana act provisions did not impose a duty on employers to accommodate on- or off-duty marijuana use.

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PUBLIC POLICY

Note of caution: *Loomis Armored Car and Kitsap County Sheriff's Deputies.*

Our Supreme Court has shown a remarkably flexible attitude toward existence of public policies in the workplace:

1. *Loomis Armored Car*: Discharge of employee violated work rule prohibiting armored car drivers from leaving the vehicle unattended overturned in light of public policy against murder and encouraging citizens to assist the police. Very tough facts.
2. In *Kitsap County Sheriff's Deputies,* the Supreme Court found there was no public policy against a police officer lying.

These cases can be a Rorschach test for the justices' personal opinions.

Robinson v. Seattle

Washington public employers should take the State Supreme Court's ultimate decision in *Roe v. TeleTech* with a grain of salt. In *Robinson*, the Washington Court of Appeals found that Article 1, Section 7 of the Washington State Constitution creates a zone of individual privacy that would be violated by a urinalysis.

For Washington public employers to require a drug test requires a "individualized suspicion."

An application for employment does not "constitute a voluntary submission to invasion of constitutional rights."

Division II without discussion upheld pre-employment testing for police and firefighters. Public safety basis required.

Practice tip: *Robinson* permits testing for "public safety purposes" but employers should expect to lay a narrow and firm foundation for such testing.

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Washington Law Against Discrimination.

Note that the plaintiff in *Roe v. TeleTech* did not assert a claim under the Washington Law Against Discrimination. Chapter 49.60 RCW.

Why? Could have had less than eight employees, or believed that decisions such as *Collings v. Longview Fibre Company* established that the use of marijuana in the workplace in violation of a drug-free workplace policy was a BFOQ.

Collings – discharged employees dealing marijuana at work.

Americans With Disabilities Act

The ADA continues to contain provisions prohibiting the application of the ADA to an individual with "current illegal drug use."

Since the ADA is a federal statute and the Federal Controlled Substances Act continues to classify marijuana as a Schedule 1 drug, employers have a defense under the ADA for refusal to accommodate the use of medical marijuana

Drug-Free Workplace Act

Entities seeking a contract or grant from the federal government must certify that they maintain a drug-free workplace. If you want to claim a drug-free workplace either as a BFOQ or to establish a defense under the new provisions of Chapter 181, Laws 2011 remember that you must:

1. Publish a statement notifying employees regarding restrictions.
2. Establish a drug-free awareness program.
3. Require each employee to be engaged in the performance of a grant to be given a copy of the statement. (Scope of Requirements – **CRITICAL)**
4. Notify employees that as a "condition of employment" employees will be required to abide by the statement and notify the employer of criminal drug statute convictions within five days of conviction.
5. Notify the granting or contracting agencies within ten days of such notification.
6. Impose a sanction or require the structured participation of a drug abuse assistance or rehabilitation program and make a good faith effort to maintain a drug-free workplace.

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Drug-free Workplace Act
Does Not Require Termination

Even where an employee has been convicted of a drug offense, the employer must take only "appropriate personnel action against such employee up to and including termination…" 41 U.S.C. Section 703.

Practice tip: Be sure that if your city has a Drug-free Workplace Act, that it is in full compliance with all the terms of the provisions.

Remember that the City will still have to satisfy just cause termination rights under Collective Bargaining Agreements.

Disparate discipline principles require that you consider how employees have been treated in the past, i.e., have your city used last chance agreements and given employees one bite at the apple or has there been a zero tolerance policy?

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CDL

The CDL guidelines established by the U.S. Department of Transportation are clear that medical use of marijuana is not an excuse for a negative drug test:

1. Medical review officers (MROs) when reviewing drug test results – are admonished not to verify a test negative based on information that a physician has recommended marijuana use.
2. Substance abuse professionals engaged in the return to work process may not take into account medical marijuana authorization.

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Initiative 502
DECRIMINALIZATION OF MARIJUANA

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The **licensed** production, processing, and sale of marijuana is decriminalized.

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I. Regulation

The Washington State Liquor Control Board is authorized to license, suspend, revoke, and renew licenses for producers, processors, and retailers. Rules to be developed by December 1, 2013.

A. Extensive rule-making authority regarding:

1. Equipment and management of retail sales;
2. Books and records;
3. Methods to produce, process, and package;
4. Security requirements;
5. Screening, hiring, training and supervision of employees;
6. Retail outlet locations and hours.

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B. State Liquor Control Board authorized to determine:

1. Maximum number of outlets per county;
2. Packaging, THC content;
3. Time, place, and manner restrictions on advertising;
4. Testing of marijuana.

C. Licensing: No license may be issued within 1000 feet of a school, playground, recreational center, childcare center, public park, public transit center, library, or game arcade (which admits individuals under 21).

D. Retail Sales: Retailers may sell no other product and these limitations apply:

1. All employees and those on the premises must be over the age of 21.
2. One sign -- 1600 square inches.
3. Can't display marijuana products.
4. No on-site consumption.

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II. Decriminalization

A. No longer a crime for those over the age of 21 to possess one ounce of marijuana, 16 ounces of marijuana-infused solids or 72 ounces of marijuana-infused liquids.

B. Crimes:

1. Opening a package of marijuana within public view (is an civil infraction).

2. Driving while under the influence (DWI laws) amended to fully equate marijuana consumption with that of alcohol. THC concentration of five nanograms per milliliter of blood is equivalent to the alcohol limit of 0.08.

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a. Measurement within two hours after driving;

b. An affirmative defense that marijuana was consumed after “the time of driving.”

3. Those under 21 will be guilty of an offence if they have a THC concentration greater than zero.

a. Measurement within two hours after driving.

b. An affirmative defense that marijuana was consumed after “the time of driving.”

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III. REVENUE CONSIDERATIONS:

A. License fees: An application fee of $250, and a licensing/administration fee of $1,000 are imposed for each person seeking a license to produce, process, or retail marijuana.

B. Marijuana fund: Twenty-five percent (25%) excise tax is levied on all retail sales of marijuana. The monies raised are to be distributed to administer the licensing program at the Washington State Liquor Control Board and for public health and education programs.

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IV. PRO & CON

A. Supporters: Rick Steves, John McKay and NORML

B. Opponents: Rob McKenna, Jay Inslee, and the Medical Marijuana Industry. Primary focus is on the driving while intoxicated provisions -- NORML call the opponents "patients against pragmatism."

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